Case Nos. A154890 & A155334

In the Court of Appeal of the State of California
First Appellate District, Division Four

Six4Three, LLC,
Respondent and Cross-Appellant,

v.

Facebook, Inc. et al.,
Appellant and Cross-Respondents.

Appeal from San Mateo County Superior Court
Hon. V. Raymond Swope; Case No. CIV 533328

Respondent Six4Three's Brief

Public - Redacts Material From Sealed record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Facebook filed an anti-SLAPP motion almost three years after the statutory deadline elapsed. It admits that it believed as early as May 2015, that it had grounds to bring the motion based on the allegations in Six4Three's original complaint. But even as those allegations were repeated in four amendments over the next two years, Facebook chose to pursue conventional litigation methods to defend its case, biding its time until the "cost-benefit calculation changed." (App. Op. Br. at p. 35.) That calculation apparently changed only when the trial court ordered discovery to proceed against Facebook's executives. Two weeks later, in November 2017, Facebook filed an anti-SLAPP motion in an effort to halt discovery and obtain a "time-out" of the trial court proceedings.

Facebook does not dispute that its motion was untimely. It argues, instead, that the trial court abused its discretion by denying the motion on that basis. This argument is meritless. In determining whether to permit a late-filed anti-SLAPP motion, the single most important factor for the trial court to consider is whether anti-SLAPP relief can still fulfill the purpose of the statute: to prevent costly, unmeritorious litigation at the initiation of a lawsuit. Here, the trial court explicitly determined that it could not. After almost three years of costly litigation, in which Facebook filed four demurrers and a motion for summary adjudication before attempting a special motion to strike, the trial court held that it was simply too late for Facebook's motion to achieve a swift, efficient, and inexpensive resolution to the case. This determination alone is sufficient to support the trial court's ruling.

Facebook raised a number of justifications for its untimely filing, which the trial court found unpersuasive, and which this Court should also reject. In essence, Facebook argues that it was reasonable to delay the filing of its motion based on the status of the case law at the time, and on Six4Three's alleged "gamesmanship." It claims further that Six4Three suffered no prejudice from the untimely filing and that it was Facebook who was prejudiced by the trial court's order, because its motion was meritorious. As discussed more fully below, all of these arguments fail. But more importantly, they are irrelevant. A trial court is not required to consider the merits of an untimely anti-SLAPP motion, nor is the plaintiff required to show prejudice. And even valid excuses for a late filing cannot change the result, if it is simply too late for the anti-SLAPP statute to fulfill its purpose.

The anti-SLAPP procedure is not an entitlement or an essential tool in a litigant's defense. It is a special advantage—a shortcut to resolving a case that spares the parties from traveling the long, expensive road of traditional litigation when a plaintiff's claims are frivolous. But by the time Facebook filed its motion here, the case had been ongoing for more than two years, a trial date had been set, and the parties had incurred substantial expense. This case has simply passed the point where anti-SLAPP relief is appropriate. Consistent with governing law and the considerable deference this Court affords to a trial court exercising its discretion to deny an untimely anti-SLAPP motion, this Court should affirm the trial court's ruling.

STATEMENT OF FACTS

A. Facebook Launches Facebook Platform and Encourages Developers to Build Applications.

Six4Three was an image recognition and photo analysis company founded in December 2012. (4 AA 1109; 4 CAA 1231.)[1] It developed a unique image classification tool that could automatically sort photos based on certain criteria, such as the presence of logos, brands, individuals, or environments—all without the need for the user to review the individual photos. (*Ibid.*) One popular application of this classification tool was Pikinis. Pikinis was an app that used Six4Three's image recognition technology to search through photos shared by Facebook users to find summer photos that included friends at the beach or pool, on a boat, in bathing suits, and the like. (4 AA 1115; 4 CAA 1237.) Six4Three chose to feature summer photos in its first app, after its survey research showed overwhelming user interest in this subject matter. (*Ibid.*) Ultimately, however, Six4Three planned to develop a suite of apps with varied image subjects, all of which would utilize Six4Three's one-of-a-kind photo sorting technology. (*Ibid.*) Six4Three's technology operated within Facebook users' privacy settings, such that it could only access photos approved by Facebook and with user permission. (*Ibid.*)

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[1] Appellant Facebook's Appendix and Sealed Appendix are referred to herein as "AA" and "SAA," respectively. Respondent Six4Three's Appendix and Sealed Appendix are referred to as "RA" and "SRA." Six4Three is also the Cross-Appellant in Appeal No. A155334, consolidated with this appeal. As the parties prepared separate appendixes, Six4Three cross-references the public and sealed appendixes from its cross-appeal ("CAA" and "SCAA," respectively) to the extent possible, for the Court's ease of reference.

Facebook operates a social networking website that enables users to connect and share information with other users. (4 AA 1086; 4 CAA 1208.) Defendants Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar (the "Individual Defendants") are all Facebook principals or executives that decided, directed, or implemented the conduct Six4Three describes in its Complaint. (4 AA 1077-85; 4 CAA 1199-1207.)

In 2007, Facebook launched its developer platform ("Facebook Platform"), which allowed developers to build applications or "apps" using data from Facebook's Social Graph. (4 AA 1086-1088; 4 CAA 1208-1210.) The Social Graph was a collection of social data compiled from user content and from content created by Facebook itself. Data from the Social Graph were accessible to developers through application program interfaces ("API" or the "Graph API"), which allowed Facebook users, through the Facebook Platform, to communicate and interact with each other in apps built by companies other than Facebook, just like Apple permits developers to build applications for its iPhones and Mac computers. A user could therefore choose between Facebook's app for a particular feature or service, if available, or an app built by another developer. Using APIs, developers could access distinct categories of Facebook content or capabilities, referred to as "endpoints," with explicit permission from Facebook users. (4 AA 1100; 4 CAA 1222.) For example, with a user's permission, Six4Three could access the "Photos" endpoint. Similarly, if a user's friend shared photos with that user, Six4Three could also, with permission from the user and friend, access the "Friends' Photos Endpoint." (4 AA 1100-1101; 4 CAA 1222-1223.) Certain endpoints also made available data or capabilities created by

Facebook, rather than users. The "User ID" and "Friends List" endpoints were two such categories of Facebook-created data, which Six4Three ultimately used in building its app. Data from these endpoints allowed Six4Three to build photo management applications that could compete with Facebook's own photos application.

Facebook's launch of Facebook Platform was accompanied by considerable fanfare and an aggressive initiative to recruit developers to build applications. (4 AA 1086-1087; 4 CAA 1208-1209.) Facebook purported to "welcome developers with competing applications, including developers whose applications might compete with Facebook-built applications" and promised that "third-party developers are on a level playing field with applications built by Facebook." (4 AA 1091-1092; 4 CAA 1213-1214.) Further, Facebook represented that it would ensure a stable privacy regime for Facebook Platform, and that users could always "choose to completely opt out of making their data available through Facebook Platform." (4 AA 1180; 4 CAA 1302.) Developers responded enthusiastically to Facebook's grand vision and invitation, and Facebook Platform quickly became one of the largest platform economies on the planet. (4 AA 1093-1094, 1104-1105; 4 CAA 1215-1216, 1226-1227.)

B. Six4Three Contracts with Facebook to Develop Pikinis on the Facebook Platform.

On December 11, 2012, Six4Three entered into Facebook's Statement of Rights and Responsibilities ("SRR"), the operative agreement in this case. (4 AA 1110; 4 CAA 1232; 1 AA 0254; 1 SRA 0030.) The primary consideration offered by Facebook under the SRR was to provide Six4Three with "all rights necessary to use the code, APIs, data, and tools you receive from us." (4 AA 1110; 4 CAA 1232;

1 AA 0257; 1 SRA 0033.) In exchange, Six4Three granted Facebook the right to analyze and audit Six4Three's application "for any purpose, including commercial." (*Ibid.*) Accordingly, Six4Three was required to share with Facebook its confidential and proprietary source code, including the intellectual property behind its photo sorting technology, upon Facebook's request. (4 AA 1112; 4 CAA 1234.) Facebook also required Six4Three to enter into a license agreement, incorporating Facebook's terms of service, with each Pikinis user. (4 AA 1132; 4 CAA 1254.)

Six4Three obtained commitments in excess of $200,000 in seed capital to build its business on Facebook Platform. (4 AA 1109; 4 CAA 1231.) A trial period of the Pikinis app was successful, with more than 4,400 users downloading the app. (4 AA 1131-1132; 4 CAA 1253-1254.) The vast majority of those users also subscribed to paid, premium content, giving Six4Three its first monthly revenues. (*Ibid.*) In 2015, just before Six4Three was abruptly shut down, the company was valued at over $4 million. (1 RA 0226; 5 CAA 1824.)

C. Facebook Shuts Down Six4Three's Access to the API.

Unbeknownst to Six4Three, by December 2012 when it entered into the SRR with Facebook, Defendant Mark Zuckerberg had already made the decision to privatize access to over 50 APIs on which Six4Three relied. (4 AA 1106-1118; 4 CAA 1228-1230.) Other Facebook principals pushed to make an announcement about this change to developers, but Zuckerberg directed that no disclosure should be made. (*Ibid.*) Instead, Facebook continued to invite developers to build apps on the Facebook Platform, knowing that tens

of thousands of apps that relied on these 50 key APIs would soon stop functioning. (4 AA 1108-1109, 1119; 4 CAA 1230-1231, 1241.)

Facebook restricted access to the Social Graph in order to leverage access to this data for advertising revenues. (4 AA 1107; 4 CAA 1229.) Accordingly, it whitelisted certain developers for continued access to the Graph API, if those companies did not directly compete with Facebook, and if they provided financial or other consideration in exchange – a relationship Facebook referred to as "Reciprocity." (AA 1106-07; 4 CAA 1228-1229.) In so doing, Facebook sold user data to other companies—something it has long said it would never do. And, contrary to its promises that developers would have "deep integration" into Facebook's website, and that competing apps would be on a level playing field with each other and with Facebook, Facebook gave preferential treatment to some developers and deliberately eliminated others from the market. (4 AA 1134-1135; 4 CAA 1256-1257.)

On January 20, 2015, Facebook informed Six4Three that it would end developer access to key Social Graph APIs on April 30, 2015. (4 AA 1131; 4 CAA 1253.) Six4Three's technology would not function without access to these APIs. As a result, Six4Three could not fulfill its purchase and license agreements with Pikinis users, or invest in further development of its business, and it ceased business operations that very day. (*Ibid.*) On the other hand, "whitelisted" companies that entered into separate agreements with Facebook, in which they promised to purchase advertising, continued to have access to the Graph API. Companies that were not approached by Facebook to enter into such agreements, or that were expressly blacklisted for being competitive with Facebook, were cut off from the

APIs and effectively forced out of business. (4 AA 1134-35; 4 CAA 1256-57.) Less than three months after Facebook cut off Six4Three's access to the Graph API, it launched two of its own photo sorting and sharing apps, both of which were directly competitive with Pikinis and the suite of apps Six4Three planned to build. (4 AA 1134; 4 CAA 1256.)

PROCEEDINGS BELOW

A. Six4Three Files its Lawsuit and Facebook Threatens an Anti-SLAPP motion.

Six4Three filed its original complaint against Facebook on April 10, 2015, alleging various business tort and contract causes of action. (1 AA 21; 1 CAA 26.) At the heart of the complaint were Six4Three's allegations that Facebook had induced developers to create applications on the Facebook Platform by agreeing to provide Social Graph APIs on a level playing field, and that Facebook's decision to terminate access to those APIs for non-whitelisted companies caused Six4Three's app to stop functioning, harming Six4Three. (1 AA 26-27; 1 CAA 31-32.) On May 26, 2015, Facebook's counsel sent a letter to Six4Three's counsel, threatening to bring an anti-SLAPP motion unless Six4Three withdrew its complaint. (4 AA 1200-1201; 4 CAA 1331-1332.) According to the letter, Facebook viewed the allegations in the complaint as an "attempt to chill Facebook's valid exercise of its free speech rights to set reasonable parameters around permissible speech on its services." (4 AA 1201; 4 CAA 1332.) Six4Three disagreed, and continued with its lawsuit.

B. Facebook Demurs to Each Amended Complaint, Moves for Summary Adjudication, and Brings Discovery Motions.

Rather than file the threatened anti-SLAPP motion, Facebook proceeded to defend its case with traditional litigation methods. In response to Six4Three's original complaint, Facebook filed a demurrer. (5 AA 1714; 8 CAA 5530.) The demurrer was mooted by Six4Three's filing of its First Amended Complaint. (1 AA 41; 1 CAA 37.) The First Amended Complaint contained the same core allegations as the original complaint but, rather than file an anti-SLAPP motion, Facebook again demurred. (1 AA 42-49, 1 AA 57; 1 CAA 38-45, 1 CAA 51.) This pattern continued throughout the filing of Six4Three's Second and Third Amended Complaints. Each iteration of the complaint contained the same essential allegations as the previous version, but each time Facebook elected to file a demurrer rather than an anti-SLAPP motion.[2] (1 AA 62-63, 173-177; 1 CAA 58-59, 294-298.) Facebook also filed a motion for summary adjudication of the first, second and eighth causes of action in the Third Amended Complaint, which the court granted in part and denied in part. (5 AA 2547; 8 CAA 5356; 1 RA 0015) And it brought at least eight discovery motions before the trial court, all before it filed the anti-SLAPP motion at issue in this case. (5 AA 2547; 8 CAA 5356.)

[2] Facebook also removed the action to federal court in January 2017, alleging federal question jurisdiction. (Doc. 1, No. 3:17-cv-00359 (N.D. Cal. Jan. 24, 2017).) Finding no federal question to be at issue, the district court remanded. (Doc. 35, No. 3:17-cv-00359 (N.D. Cal. Feb. 14, 2017).

C. Facebook Files an Anti-SLAPP Motion to Strike Six4Three's Fourth Amended Complaint, after the Trial Court Orders Discovery to Proceed Against Facebook's Executives.

Six4Three filed its Fourth Amended Complaint on November 1, 2017. Like the previous versions, the Fourth Amended Complaint made the same essential allegations about Facebook's conduct. (1 AA 278; 2 CAA 396.) At a case management conference on November 7, 2017, the trial court set a trial date and pretrial deadlines. (1 AA 378-383; 2 CAA 496-501.) It also set a deadline for Facebook to respond to Six4Three's Fourth Amended Complaint, including a briefing schedule and hearing date in the event that "the response is anything other than an Answer." (1 AA 383; 2 CAA 501.) Importantly, the court also ordered certain discovery to proceed, over Facebook's objections. It ordered documents in the custody of Facebook CEO Mark Zuckerberg to be produced within 30 days. (1 AA 383-384; 2 CAA 501-502.) And it scheduled the depositions of two other Facebook executives—Dave Morin and Ilya Sukhar—for dates in early December 2017. (1 AA 384; 2 CAA 502.)

Almost three years after Six4Three first filed this action, on November 21, 2017, Facebook responded to Six4Three's Fourth Amended Complaint by filing its anti-SLAPP motion. Given the extraordinary delay, Six4Three opposed the motion as untimely, among other substantive grounds. (2 AA 5018; 2 CAA 638.)

D. The Trial Court Holds a Hearing on the Motion but Defers its Ruling.

The trial court held a hearing on Facebook's anti-SLAPP motion on January 9, 2018. The California Supreme Court was, at that time, considering the question of the timeliness of anti-SLAPP motions

brought to strike amended complaints in *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 639-640. Accordingly, the trial court elected to defer its decision until *Newport Harbor* was decided. (1 RT 74-75.)[3] It also requested supplemental briefing from both parties on the issues of commercial speech and Facebook's asserted defense under the federal Communications Decency Act (CDA). (4 AA 1185; 4 CAA 1307.)

Meanwhile, the deadline for Facebook to comply with the trial court's order to produce documents and deposition witnesses had passed by the time of the January 9, 2018 hearing, and Facebook did not comply with the order. Instead, Facebook took the position that the filing of its anti-SLAPP motion vitiated the trial court's prior discovery order. (1 RT 52.) The trial court disagreed, noting that "there is no case that's been reported in California that says that a discovery order is vitiated by bringing a SLAPP motion two and a half years after the case has been brought." (*Ibid.*) Although the court agreed to defer its ruling on the discovery order until the parties provided the supplemental briefing it had requested, it was disinclined to stay its existing discovery orders. (1 RT 60-63 ["Why would I delay their discovery to hear that your motion should be stricken as untimely?"].)

[3] "1 RT" refers to Volume 1 of the Reporter's Transcript, which transcribes the January 9, 2018 hearing before the trial court. "2 RT" refers to Volume 2 of the Reporter's Transcript, which transcribes the hearing on July 2, 2018.

E. Six4Three Adds the Individual Defendants, Who File an Anti-SLAPP Motion and Strike the Judge.

Six4Three had earlier sought to amend its Second Amended Complaint to add the Individual Defendants—all Facebook principals who Six4Three alleges directly participated in Facebook's wrongful conduct. The trial court initially denied that request. (1 RA 0006; 1 CAA 288.) Six4Three sought writ relief from this Court and, while Facebook's Anti-SLAPP Motion was pending, this Court ordered the trial court to permit Six4Three's amendment. (1 RA 0011; 2 CAA 627.) As Six4Three had by then already filed its Fourth Amended Complaint, the trial court issued an order permitting Six4Three to file a Fifth Amended Complaint, adding the Individual Defendants. Six4Three filed its Fifth Amended Complaint on January 12, 2018. (4 AA 1069; 4 CAA 1191.) The Individual Defendants then filed a Special Motion to Strike the Fifth Amended Complaint on May 3, 2018. (5 AA 1644; 8 CAA 5460.)

On January 26, 2018, the Individual Defendants filed a peremptory challenge to the trial court judge, and the case was transferred to the Hon. V. Raymond Swope. The California Supreme Court decided *Newport Harbor* on March 22, 2018 and, following a case management conference on April 27, 2018, Judge Swope ordered the parties to prepare supplemental briefing on the effect of that case on Facebook's anti-SLAPP motion. The court also set a briefing schedule for the Individual Defendants' anti-SLAPP Motion, and ordered that both anti-SLAPP motions would be heard and decided together. (4 AA 1316; 8 CAA 4863.)

F. Judge Swope Denies Facebook's Motion as Untimely, and Grants the Individual Defendants' Motion Solely on Procedural Grounds.

After holding a further hearing on the Defendants' anti-SLAPP motions on July 2, 2018, the trial court denied Facebook's motion as untimely, relying on *Newport Harbor*. (5 AA 1543; 8 CAA 5352.) In its order, the trial court noted that Facebook acknowledged it believed the anti-SLAPP statute applied to Six4Three's original complaint, but had made the deliberate decision not to file the motion at the outset of the case. (5 AA 1548; 8 CAA 5357.) It also analyzed and rejected each of Facebook's proffered justifications for failing to file its motion earlier. (5 AA 1544-1548; 8 CAA 5353-5357.) Finding that it was "far too late for the anti-SLAPP statute to fulfill its purpose of resolving the case promptly and inexpensively," the trial court exercised its discretion to deny Facebook's late-filed motion. (5 AA 1548; 8 CAA 5357.)

With regard to the Individual Defendants' motion, the trial court conducted a favorable analysis of Six4Three's opposition on the merits, but granted the anti-SLAPP motion on procedural grounds, namely, that Six4Three had improperly incorporated arguments from its opposition to Facebook's anti-SLAPP motion into its opposition to the Individual Defendants' anti-SLAPP motion, and that this incorporation by reference increased the length of Six4Three's brief beyond the page limit permitted under Rule of Court 3.1113(d). (5 AA 1551-1552; 8 CAA 5360-5361.)[4]

[4] That determination is the subject of Appeal No. A155334, consolidated with this appeal.

On July 23, 2018, Facebook filed a notice of appeal from the trial court's order, which was docketed under Case No. A154890. On September 10, 2018, Six4Three filed a cross-appeal, challenging the trial court's grant of the Individual Defendants' anti-SLAPP motion. That appeal was docketed under Case No. A155334. Because Facebook's appeal and Six4Three's cross-appeal were taken from the same trial court order and both involve challenges to the trial court's anti-SLAPP analysis, the parties jointly moved this Court for an order consolidating the appeals. The Court granted the motion on October 12, 2018.

ARGUMENT

A. The Superior Court Properly Applied Its Discretion to Refuse to Consider Facebook's Untimely Motion.

The California Supreme Court held definitively that a motion to strike under Code of Procedure section 425.16 must be brought within 60 days of the first complaint that pleads a cause of action that falls within the ambit of the statute. (*Newport Harbor, supra*, 4 Cal.5th at p. 646.) Facebook does not dispute that its anti-SLAPP motion was filed almost three years late, and is untimely under *Newport Harbor*. (App. Op. Br. at pp. 39-40; 2 RT 6.)[5] It nonetheless urges this Court

[5] Facebook cites the trial court's November 7, 2017 case management order in support of its statement that it filed its anti-SLAPP motion "after obtaining the Superior Court's permission" and criticizes the trial court for denying the motion "[d]espite having given Facebook prior approval to file its anti-SLAPP motion." (App. Op. Br. at pp. 26-27.) To the extent Facebook suggests the trial court somehow reneged on an agreement to allow Facebook to file an anti-SLAPP motion outside the statutory timeline, this is inaccurate. The case management order simply set aside time for briefing in the event that

to find that the trial court abused its discretion for denying the late motion. (App. Op. Br. at p. 31.)

Facebook's burden is high. The Court may reverse the trial court's order only if (1) "the grounds given by the court … are inconsistent with the substantive law of section 425.16," or (2) the court's application of the law to the facts of the case is "outside the range of discretion conferred upon the trial court under that statute, read in light of its purposes and policy." (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1187 [citing *Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 285].) Facebook does not argue that the trial court's order was contrary to the statute's actual mandate. (*See id.* at 1188.) Facebook argues only that the trial court's order was inconsistent with the "purpose and policy" of the anti-SLAPP statute. (App. Op. Br. at pp. 31-32.) This Court should affirm the trial court's order because, contrary to Facebook's contention, the order is entirely faithful to the "purpose and policy" of the statute.

1. Facebook's Late-Filed Motion Cannot Serve the Anti-SLAPP Statute's Purpose.

The purpose of the anti-SLAPP statute is to "provide a mechanism for the *early* termination of claims that are improperly aimed at the exercise of free speech or the right of petition." (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 841 [emphasis in original]*; see also Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 682 ["The purpose of these timing requirements is to facilitate the

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Facebook filed "anything other than an Answer" to Six4Three's newly-filed Fourth Amended Complaint. (1 AA 383; 2 CAA 501.) This was neither an explicit nor tacit agreement by the trial court to approve an untimely anti-SLAPP motion.

dismissal of an action subject to a special motion to strike early in the litigation so as to minimize the cost to the defendant."].) An untimely anti-SLAPP motion cannot fulfill the purpose of the statute if the defendant waits until after the parties have incurred significant expense. (*Newport Harbor, supra,* 4 Cal.5th at p. 645 ["An anti-SLAPP motion is not a vehicle for a defendant to obtain a dismissal of claims in the middle of litigation; it is a procedural device to prevent costly, unmeritorious litigation at the initiation of the lawsuit."] [citing and quoting *San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 625-626.].) As litigation proceeds and the costs of discovery and motion practice mount, the utility of the anti-SLAPP statute diminishes, as does the justification for relying on the statute over conventional methods of litigation. (*Hewlett-Packard Co., supra*, 239 Cal.App.4th at p. 1189.) Accordingly, "every case will come to a point beyond which an anti-SLAPP motion simply cannot perform its intended function." (*Id.*) This case is well beyond that point.

Facebook first asserted grounds for an anti-SLAPP motion on May 26, 2015, when it sent a letter to Six4Three, threatening to bring such a motion if it did not withdraw its complaint. (4 AA 1201, 5 AA 1546; 4 CAA 1332, 8 CAA 5355; 2 RT 28.) Facebook admitted at the hearing that its grounds for the motion were evident in Six4Three's original complaint, and that it could have brought the motion earlier. (2 RT 18-19; *see also* App. Op. Br. at p. 33.) However, rather than file its motion to strike at the outset of litigation, Facebook elected to pursue conventional methods of defending its case. In the span of almost three years, Facebook filed four demurrers, moved for summary adjudication, and brought eight discovery motions. (5 AA

1546-1547; 8 CAA 5355-5356.) Both parties incurred significant litigation expenses. Facebook admitted at the motion hearing that it already "had to spend an extraordinary amount of money" on litigation and the trial court likewise observed that the attorneys' fees for both parties over the previous two years were likely "enormous." (2 RT 14, 23.) Accordingly, the trial court properly held that it was "far too late for the anti-SLAPP statute to fulfill its purpose of resolving the case promptly and inexpensively." (5 AA 1548; 8 CAA 5357 [citing and quoting *Newport Harbor, supra*, 4 Cal.5th at 645].) And, as the "most important consideration [in determining whether to permit a late motion] is whether the filing advances the anti-SLAPP statute's purpose of examining the merits of covered lawsuits in the early stages of the proceedings," (*San Diegans for Open Government, supra*, 240 Cal.App.4th at p. 624) the trial court was well within its discretion to deny Facebook's motion to strike as untimely. No case has held that a court abused its discretion by denying an anti-SLAPP motion filed, as here, after the 60-day deadline has passed (*see Hewlett-Packard Co., supra,* 239 Cal.App.4th at p. 1190). Indeed, this Court has affirmed denials of anti-SLAPP motions based on much shorter lapses of time. (*See, e.g., Chitsazzadeh, supra,* 199 Cal.App.4th at 680–681 [113 days late]; *Morin v. Rosenthal* (2004) 122 Cal.App.4th 673 [90 days late]; *Olsen v. Harbison, supra,* 134 Cal.App.4th at pp. 282, 283 [278 days late].) In fact, where a trial court agreed to hear an anti-SLAPP motion filed some two years after the filing of the complaint, this Court held that the trial court's decision to *hear* such an untimely motion was an abuse of discretion. *Platypus Wear, Inc. v. Goldberg, supra,* 166 Cal.App.4th 772. This Court should not depart from its jurisprudence.

2. Facebook's Excuses for its Late Filing are Unavailing

Facebook presents a number of justifications for its deliberate decision to delay its anti-SLAPP motion until the parties had been litigating for three years and a trial date was pending. But an excuse for a late filing does not deprive the trial court of its discretion to deny the motion as untimely. (*Hewlett-Packard Co., supra*, 239 Cal.App.4th at p. 1191.) This is because even if Facebook's justifications are sound—which they are not—an anti-SLAPP motion filed almost three years into litigation can no longer serve the purpose of providing an expedited resolution to the case. "No showing of blamelessness or justification on the part of the defendant can restore what time has destroyed. All the motion can accomplish is delay." (*Id.* at p. 1192.) Accordingly, Facebook's justifications are simply not relevant to this Court's review. As described below, Facebook's reasons for delaying the filing of its anti-SLAPP motion are also without merit.

a) *Yu* was not the sole authority on the timeliness of anti-SLAPP motions.

Facebook argues, as it did to the trial court, that it justifiably relied on *Yu v. Signet Bank/Virginia* (2014) 103 Cal.App.4th 298 as the only "binding precedent" holding that a defendant could file an anti-SLAPP motion within 60 days of any amended complaint. (App. Op. Br. at 33, 38; citing *Yu* at p. 315.) But *Yu* was not the only precedential decision on the question of the timeliness of anti-SLAPP motions filed in relation to amended complaints. In *Hewlett-Packard Co.*, the Sixth Appellate District of this Court disagreed with *Yu*,

noting that allowing a defendant to bring an anti-SLAPP motion upon the filing of any amended complaint—even one that raised no new grounds for the motion—would be an abuse of the statute. (*Hewlett-Packard Co., supra*, 239 Cal.App.4th at 1192; *cf Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1115-1116 [anti-SLAPP motion was timely when brought against an amended complaint that made substantive changes to the original].)

In *Newport Harbor*, the Fourth Appellate District agreed with the Sixth District, citing the California Supreme Court's decision in *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, which emphasized that the purpose of the anti-SLAPP statute is to provide efficient, expedited relief. Accordingly, the *Newport Harbor* Court held that permitting a defendant an absolute right to file an anti-SLAPP motion to an amended complaint "would encourage gamesmanship that could defeat rather than advance that purpose." (*Newport Harbor, supra*, 4 Cal.5th at p. 644 [quoting the Court of Appeal opinion in *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1218].) Although the authority of the Court of Appeal's holding in *Newport Harbor* was stayed while the case was before the California Supreme Court, it was hardly the case that *Yu* stood alone as a precedential beacon. To the contrary, the California Supreme Court granted review of *Newport Harbor* in order to resolve the split in authority presented by three appellate districts in four cases: *Yu*, *Hewlett-Packard*, *Newport Harbor*, and *Lam*.[6] There was contrary judicial authority weighing on

[6] Although Appellant cites *Lam* for the proposition that an anti-SLAPP motion may be filed within 60 days of an amended complaint (App. Op. Br. at p. 34), *Lam* did not reach the issue of whether the

the question of Facebook's timeliness. The trial court did not find Facebook's reliance on *Yu* persuasive, nor should this Court. (5 AA 1544; 8 CAA 5353.)

b) Facebook's unreasonable delay in filing its anti-SLAPP motion is an abuse of the statute.

Facebook nobly claims that it waited to file its anti-SLAPP motion in light of judicial criticism of the "overzealous use—and misuse—of the anti-SLAPP procedure." (App. Op. Br. at p. 34 [citing *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 997-1002].) According to Facebook, it "reasonably chose to defer filing an anti-SLAPP motion while it pursued other ways to resolve the case swiftly." (App. Op. Br. at p. 34.) Facebook's purported justification is meritless for three reasons.

First, Facebook's strategy did not resolve the case swiftly—it prolonged it. Facebook filed four demurrers and a motion for summary adjudication over the course of two years, and the case was already set for trial before Facebook filed its motion to strike. (5 AA 1546-1547; 8 CAA 5355-5356.) Although Facebook claims it was forced to take this course of action by Six4Three's evolving theories and "gamesmanship," it admits, and the trial court found, that it could have avoided Six4Three's amendments to the complaint had it filed

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motion would be timely as to causes of action that were included in an earlier complaint. The preceding complaint in *Lam* "contained no anti-free-speech claims." (*Lam, supra*, 91 Cal.App.4th at p. 841.) Ultimately, the *Lam* Court held that the anti-SLAPP motion was timely filed. As a court *must* consider a timely-filed motion under the statute, there was no discretion at issue and *Lam* is inapposite to this case. (*Id.* at pp. 840, 842.)

its anti-SLAPP motion at the outset of the case. (2 RT 19; 5 AA 1547; 8 CAA 5356.) By the time Facebook finally filed its motion, there was clearly no swift resolution to be had.

Second, Facebook filed the anti-SLAPP motion in order to thwart discovery, not because there had been any consequential change in Six4Three's allegations. Facebook filed its motion immediately after the trial court ordered it to produce documents in response to Six4Three's discovery requests, and ordered—setting forth firm dates—two Facebook executives to sit for deposition. (1 AA 383-384; 2 CAA 501-502.) Thus, Facebook's anti-SLAPP motion was designed to give Facebook a "time-out" at a key pressure point in the litigation. This was evident in Facebook's argument at the initial motion hearing, where it spent considerable time and effort arguing that the filing of its anti-SLAPP motion should stay the trial court's discovery order. (1 RT 49-55.) When the trial court disagreed, the defendants took advantage of the first opportunity (presented three days after the hearing by the filing of Six4Three's Fifth Amended Complaint) to strike the judge. (1 RA 0032; CAA 1344.)

Third, Facebook's anti-SLAPP strategy is precisely the type of abuse that *Grewal* and other cases caution against. The primary abuse of the anti-SLAPP statute is perpetrated when a defendant files an unmeritorious (and, in this case, untimely) motion "knowing that it will cause the plaintiff to expend thousands of dollars to oppose it, all the while causing the plaintiff's case, and ability to do discovery, to be stayed." (*Grewal, supra*, 191 Cal.App.4th at pp. 999-1000.) This is exactly what Facebook did, followed by "the abuse coup de grâce—the appeal." (*Id.* at p. 1000.) The California Supreme Court recognized the high potential for abuse of the appeal and automatic

stay process in *Varian Medical Systems, Inc., supra*, 35 Cal.4th at p. 195. Even while affirming that a defendant's appeal stays all proceedings on the merits in the trial court, the Court lamented that this process could "encourage defendants to misuse the [anti-SLAPP] motions to delay meritorious litigation or for other purely strategic purposes." (*Ibid.* [internal quotations omitted]; *Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 783 [noting the potential for "tactical manipulation of the stays that attend anti-SLAPP proceedings].) In this case, Facebook was happy to proceed with litigation for more than two years, engaging in costly motion and discovery practice and driving up attorney fees for both parties. But, as Facebook admits, it intended to take advantage of the anti-SLAPP procedure "if the cost-benefit calculation changed." (App. Op. Br. at p. 35.) And that calculation certainly changed when the trial court ordered discovery to proceed against Facebook's executives, and when Six4Three was permitted to add the individual defendants in its Fifth Amended Complaint. Facebook's decision to wield the anti-SLAPP procedure as a weapon to "get a free time-out in the trial court" was an abuse of the statute. (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1318.)[7]

c) Six4Three was prejudiced by Facebook's late motion.

Facebook argues that Six4Three was not prejudiced by Facebook's untimely anti-SLAPP motion, and that the trial court

[7] If the Court rules in Six4Three's favor, Six4Three urges the Court to make explicit in its holding that Facebook's anti-SLAPP motion was frivolous and brought solely to create delay. Six4Three intends to move the trial court for an order imposing sanctions on that basis.

erred by failing to "take into account the lack of prejudice to Six4Three." (App. Op. Br. at p. 38.) Six4Three was not required to make any showing of prejudice. (*Olsen, supra*, 134 Cal.App.4th at 287.) Nonetheless, the prejudice to Six4Three is evident—it lies not only in the costs and fees it has incurred to pursue its case under the conventional litigation timeline, but in the delay and additional costs Facebook has caused Six4Three as a result of its untimely motion, the attendant stay of the trial court proceedings, and this appeal. (*Ibid.*; *Platypus Wear, Inc., supra*, 166 Cal.App.4th at p. 785 [although a showing of prejudice was not required, it was evident that the plaintiff suffered prejudice from the "lengthy delay in bringing its claims to trial caused by [defendant's] potential interlocutory appeal of the court's anti-SLAPP ruling."].)

Facebook goes even further, claiming that Six4Three "benefited from Facebook's decision not to file its anti-SLAPP motion at the outset of the litigation" because the long delay allowed Six4Three to obtain evidence to support its opposition to the motion, giving it an "advantage over other anti-SLAPP respondents." (App. Op. Br. at p. 37.) While it is difficult to know quite how to respond to such an incredible assertion, suffice it to say that the significant time and resources Six4Three spent on the "benefit" of obtaining discovery and evidence in this case underscore how costly and time-consuming this case has been, and how ill-suited Facebook's motion is to achieving the anti-SLAPP statute's goal of resolving cases quickly, efficiently, and inexpensively. (*Newport Harbor, supra*, 4 Cal.5th at 645; *San Diegans for Open Government, supra*, 240 Cal.App.4th at p. 624.)

Facebook further argues that *it* has been prejudiced by the trial court's ruling, because it claims its anti-SLAPP motion is meritorious. As discussed more fully in Section IV.B below, Facebook's motion also fails on the merits. However, the trial court was under no obligation to reach the merits—as this Court is not—because "[d]iscretion to permit or deny an untimely motion cannot turn on the final determination of the merits of the motion." (*Olsen, supra*, 134 Cal.App.4th at p. 286.) Rather, a court has the discretion to deny an untimely motion without even considering the merits. (*Chitsazzadeh, supra*, 199 Cal.App.4th at 682; *see also Lam, supra*, 91 Cal.App.4th at 840.) It was therefore proper for the trial court to deny Facebook's motion solely on the ground that it was untimely.

d) The parties' subsequent discovery dispute is not relevant here.

Facebook makes numerous references to an ongoing dispute between the parties in the trial court, which stems from Facebook's allegation that Six4Three violated the terms of the parties' protective order. (App. Op. Br. at pp. 28-30, 36.) As that dispute began almost one year after Facebook filed its anti-SLAPP motion and four months after the trial court denied it, it can have no possible relevance to the timeliness of Facebook's motion or the factors the court considered in exercising its discretion to deny the motion. (*See* AA 1736.) Facebook's argument that Six4Three's disclosure of case documents—a disclosure that was compelled by the UK Parliament—"multiplied the burdens associated with this litigation—burdens that could have been avoided had the court ruled on Facebook's anti-SLAPP motion" is also unavailing. (App. Op. Br. at p. 36.) While

Six4Three denies that it engaged in wrongdoing, any "burdens" on the parties that could have been eased by a ruling favorable to Facebook on its anti-SLAPP motion could have been completely eliminated if Facebook had filed its motion at the outset of the case. (2 RT 19; 5 AA 1547; 8 CAA 5356.) Whatever aspersions Facebook chooses to cast on Six4Three's conduct, the fact remains that the allegations Facebook claims to fall within the purview of the anti-SLAPP statute were evident in Six4Three's original complaint three years ago, and were re-alleged in every subsequent amendment. (5 AA 1544-1547; 8 CAA 5353-5356.) To the extent Facebook holds a favorable anti-SLAPP order out as a bulwark that would have protected it from the burdens of litigation, it has no one but itself to blame for not seeking that order years ago.

B. An Order Denying a Timely Anti-SLAPP Motion is Reviewed *De Novo*.

Consistent with the proper exercise of its discretion, the trial court declined to reach the merits of Facebook's anti-SLAPP motion, and this Court should do the same.[8] However, even if this Court undertakes an analysis of Facebook's substantive arguments, it

[8] This Court should reject Facebook's assertion that the trial court reached the merits of its anti-SLAPP motion or found it to be meritorious. (App. Op. Br. at p. 28.) Facebook bases this argument on the fact that the trial court granted the Individual Defendants' anti-SLAPP motion, and on its view that there was complete overlap in the substantive issues across both motions. (*Ibid.*) But the trial court actually indicated that Six4Three had the better of the argument on the merits. (5 AA 1556-1557; 8 CAA 5365-5366.) It nonetheless granted the Individual Defendants' motion because it wrongly held that Six4Three had effectively failed to oppose it. (5 AA 1551-1555; 8 CAA 5360-5364.)

should hold that the motion fails because: (1) the statements at issue are unprotected, commercial speech, (2) the Communications Decency Act does not immunize Facebook's conduct, and (3) Six4Three can meet the minimal threshold for showing a likelihood of prevailing on the merits of its complaint.

An appellate court reviews an order granting an anti-SLAPP motion *de novo*. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) The court analyzes the motion in two steps. First, the court decides whether the defendant has met its burden to show that the challenged cause of action is one 'arising from' protected activity. (Code Civ. Proc. § 425.16, subd. (b)(1).) If, and only if, the court finds the defendant has made such a showing must it consider whether the plaintiff has demonstrated a probability of prevailing on the claim. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.)

The plaintiff's burden on the second prong of this analysis is low: Only a cause of action that lacks "minimal merit" is subject to being stricken under the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) If the plaintiff "can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless" and will not be stricken; "once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106 [emphasis in original].)

C. Six4Three's Causes of Action Do Not Arise from Protected Activity.

California's anti-SLAPP statute empowers courts to strike lawsuits that are "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc. § 425.16, subd. (a).) Section 425.16 applies to conduct that furthers the exercise of free speech in connection with an issue of public interest. (*Id.*, subd. (e)(4).) On a motion to strike under section 425.16, it is the defendant's burden to demonstrate that the speech at issue arises from such protected activity. In evaluating the motion, courts "look for the principal thrust or gravamen of the plaintiff's cause of action." (*Hecimovich v. Encinal School Parent Teacher Org.* (2012) 203 Cal.App.4th 450, 465. [internal quotations and citations omitted].) The "critical consideration is what the cause of action is based on." (*Ibid.*)

Facebook made false and misleading representations about the management of Facebook Platform and its status as a level playing field, to encourage developers to create apps that would generate user engagement and revenue streams for Facebook and its principals. Thus, at the most fundamental level, this dispute is not about statements Facebook made in furtherance of its free speech rights. It is about representations it made to software developers about the terms under which Facebook would make APIs available to those developers on Facebook Platform. The speech at issue is not protected speech; it is commercial speech exempted from the protections of the anti-SLAPP statute.

1. The Speech at Issue is Commercial Speech, Exempted from Protection Under Code of Civil Procedure § 425.17.

The Legislature enacted section 425.17 in response to a "disturbing abuse" of the anti-SLAPP statute, in which defendants attempted to reframe commercial disputes as First Amendment issues and use anti-SLAPP motions as a "litigation weapon to slow down and perhaps even get out of litigation." (*See* Code Civ. Proc. § 425.17, subd. (a); Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 515 [2003–2004 Reg. Sess.] as amended July 8, 2003, p. 7; Sen. Com. On Judiciary, Analysis of Sen. Bill No. 515 [2003–2004 Reg. Sess.] as amended May 1, 2003, p. 5.) Accordingly, section 425.17 provides that anti-SLAPP protection is unavailable for commercial speech. (Code Civ. Proc. § 425.17.)

Subdivision (c) provides, in relevant part, that the anti-SLAPP statute does not apply to "any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services" if:

> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services[; and]
>
> (2) the intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer . . . .

Under the two-prong analysis that courts conduct in evaluating an anti-SLAPP motion, the question of whether the speech at issue falls under the commercial speech exception is analyzed under prong one. (*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 308.)

In *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, the California Supreme Court distilled the requirements of section 425.17(c) into a four-part test. Under this test, speech is exempted from protection under the statute if: (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2). (*Id.* at p. 30.). Six4Three prevails on each element of the *Gore* test.

a) Facebook is primarily engaged in the business of selling or leasing goods or services.

Under this Court's analysis in *Demetriades*, Facebook is "primarily engaged in the business of selling or leasing goods or services," bringing it within the scope of section 425.17(c). In *Demetriades*, a restaurant owner sued Yelp, the operator of a popular website that contains customer reviews of businesses. (*Demetriades, supra*, 228 Cal.App.4th at p. 298.) The plaintiff alleged that Yelp had

made false claims about the accuracy and efficacy of its "filter" for unreliable or biased customer reviews. (*Ibid.*) In determining that Yelp was "primarily engaged in the business of selling or leasing goods or services," the court found that Yelp's revenue stream indicated it was primarily in the business of providing advertising to businesses. (*Id.* at p. 312.) Yelp had argued that "although Yelp sells advertising, it is primarily engaged in providing a free public forum for members to read and write reviews about local business, services, and other entities." (*Id.* at p. 305.) But the Court disagreed with Yelp's characterization of its business, holding instead that the user reviews were a "device whereby prospective users and reviewers are attracted to Yelp's Web site. Thus, Yelp's statements about the accuracy and performance of its review filter are designed to attract users and ultimately purchasers of advertising on its site." (*Id.* at p. 312.)

Demetriades is on all fours with this case. Like Yelp, Facebook is primarily in the business of selling advertising.[9] It is part of a duopoly that captures 99% of the growth in the digital advertising industry. (4 AA 1074; 4 CAA 1439; 1 SRA 0048-51; 2 SCAA 1010-1013.) A recent study showed that Facebook's share of that growth translates to approximately $8 billion per year. (*Ibid.*) As detailed in Six4Three's complaint, Facebook lured in a large number of

[9] Indeed, during Mark Zuckerberg's testimony before the United States Senate, Senator Orrin Hatch specifically asked how Facebook sustains "a business model in which users don't pay for your service?" Zuckerberg famously quipped, "Senator, we run ads." (*Transcript of Mark Zuckerberg's Senate Hearing*, Wash. Post (Apr. 10, 2018) https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/ [as of Feb. 25, 2019].)

developers by providing access to the Graph API at no cost, but cut off this access to companies unless they agreed to make minimum annual purchases in Facebook's new mobile advertising product or provided other financial consideration, and only if they did not compete with Facebook.[10] (4 AA 1106-1107; 4 CAA 1228-1229.) Particularly with regard to Facebook Platform, Facebook did not simply offer a free public forum for social exchange. Rather, it offered Facebook Platform as a way to propel users and revenues to Facebook. (4 AA 1098-1099; 4 CAA 1220-1221.) Just like Yelp in the *Demetriades* case, although Facebook offers a free social media service to its website users, Facebook's business is sustained through advertising sales. (4 AA 1074; 4 CAA 1439; 1 SRA 0048-51; 2 SCAA 1010-1013.) Ultimately, Facebook's free service is designed to attract users and prospective purchasers of advertisements—software developers like Six4Three and other businesses.

(1) *Cross* is inapposite.

In its briefing before the trial court, Facebook argued that it is not primarily engaged in the business of selling goods or services, based on the Court of Appeal's ruling in *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 203. However, as the trial court pointed out at hearing, *Cross* "is not similar to this" case. (1 RT 71.) In *Cross*, a musician (Knight) sued Facebook when it refused to disable a user-

[10] Six4Three purchased advertising from Facebook in order to promote and test Pikinis but was not approached by Facebook to enter into "whitelisted" purchase agreements, presumably because it was a small business, and Facebook had determined that photo apps were too competitive to be whitelisted. (4 AA 1108, 1117-1118, 1134; 4 CAA 1230, 1239-1240, 1256.)

created page that Knight claimed to have incited violence and death threats against him. (*Cross*, *supra*, 14 Cal.App.5th at p. 194.) In holding that the commercial speech exemption under section 425.17 did not apply, the Court of Appeal determined that "while Facebook sells advertising, it is not 'primarily engaged in the business of selling or leasing goods or services.' Knight has not alleged that it is. Nor could he, as Facebook offers a free service to its users." (*Id.* at p. 203.)

Facebook takes these lines to be a judicial proclamation of the nature of Facebook's business in all contexts, and for all time. They are not.[11] *Cross* was a case brought by a Facebook user, attempting to hold Facebook liable for the conduct of other users. It is in that context that the Court of Appeal made its statement that Facebook was not "primarily engaged in the business of selling or leasing goods or services." (*See ibid.*). And it is for that reason that the Court opined that Knight could not allege otherwise—because he was a Facebook user, and the "free service" offered to him did not involve the selling or leasing of goods and services. (*See ibid.* [("Facebook offers a free service *to its users*."] [emphasis added].)

Unlike the plaintiff in *Cross*, Six4Three brings its lawsuit as a defrauded software developer and party to a breached contract, not as a Facebook user. (4 AA 1109-1110; 4 CAA 1231-1232.) Its claims arise from Facebook's treatment of data as a commodity, and the false representations it made about fair and equal access to that commodity, in order to further its business interests. (4 AA 1071-

[11] And, in any event, this Court is not bound by the *Cross* court's characterization of the nature of Facebook's business. (*Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.)

1072; 4 CAA 1193-1194.) In that context, and in light of Facebook's revenue stream, there can be little doubt that Facebook is primarily engaged in the business of selling advertising. This is not a case where statements made by users are at issue, or where Facebook's statements were made to users in its role as a provider of the Facebook website to those users. Thus, *Cross* is inapposite and, as the trial court observed, this case more closely resembles *Demetriades.* (*See* 5 AA 1556; 8 CAA 5365.)

b) Facebook's statements about the availability of the Graph API are representations of fact about its business operations and services, made for the purpose of promoting or securing sales of advertising and other commercial transactions.

Six4Three is suing Facebook over false or misleading representations of fact it made about services it purported to provide to developers—representations that Six4Three relied on to its detriment. Specifically, these representations include:

- "Facebook Platform offers deep integration in the Facebook website, distribution through the social graph and an opportunity to build a business." (4 AA 1090; 4 CAA 1212.)
- "…applications from third-party developers are on a level playing field with applications built by Facebook. (*Ibid.*)
- "…third-party developers can now create applications on the Facebook site with the same level of integration as applications built by internal Facebook developers." (*Ibid.*)
- "You can now build applications that have the same access to integration into the social graph as Facebook applications…" (4 AA 1088; 4 CAA 1210.)
- "Third-party applications won't be treated like second-class citizens." (4 AA 1089; 4 CAA 1211.)
- "With this evolution of Facebook Platform, we've made it so that any developer can build the same applications that we can.

And by that, we mean that they can integrate their application into Facebook—into the social graph—the same way that our applications like Photos and Notes are integrated." (4 AA 1097; 4 CAA 1219.)

- "Developers also benefit from the Facebook Platform as it gives them the potential to broadly distribute their applications and even build new business opportunities." (4 AA 1090; 4 CAA 1213.)
- "You can gain distribution for your applications through the social graph like never before. Applications can be virally engineered to reach millions of Facebook users quickly and efficiently through the profile, news, feed, and mini-feed…." (4 AA 1088; 4 CAA 1210.)
- "You are free to monetize your canvas pages through advertising or other transactions you control." (*Ibid.*)
- "…we're giving developers the freedom to monetize their applications as they like." (*Ibid.*)

The main points communicated by these representations to software developers like Six4Three were that: (1) developers would have "deep integration" and access to social data in order to build their applications on the Facebook Platform; (2) that such integration and access would be provided on a level playing field among developers and Facebook itself; and (3) that Facebook was committed to providing a platform for developers to build applications and monetize their businesses. (4 AA 1087-1089; 4 CAA 1209-1211.)

The above-described representations are similar in kind to the representations at issue in *Demetriades*. There, Yelp made statements about the accuracy of its review filter, including:

- All reviews go through a "remarkable filtering process that takes the reviews that are the most trustworthy and from the most established sources and displays them on the business page."
- The filter "keeps the less trustworthy reviews out so that when it comes time to make a decision you can make that [decision] using information and insights that are actually helpful."

- "Rest assured that our engineers are working to make sure that whatever is up there is the most unbiased and accurate information you will be able to find about local businesses."
- "Yelp has an automated filter that suppresses a small portion of reviews—it targets those suspicious ones you see on other sites."

(*Demetriades, supra*, 228 Cal.App.4th at p. 301.) The Court held that Yelp's statements were "representations of fact about its services." (*Id.* at p. 311.) Key to its holding was the Court's determination that these were "specific, detailed statements intended to induce reliance" on the Yelp filter. (*Ibid.*). The same is true of Facebook's statements here. Like Yelp, Facebook developed proprietary software and made representations of fact to developers about the nature and availability of that software. (*See id.* at pp. 300, 311; 4 AA 1086-88; 4 CAA 1208-10.) Those representations were designed to induce developers to build their applications on Facebook Platform, which generated new users and advertising revenues for Facebook. (4 AA 1071-1072; 4 CAA 1193-1194.) The statements above are themselves an invitation to developers to build their businesses on Facebook Platform, and other statements made by Facebook and its principals further demonstrate this intent. For example, Defendant Mark Zuckerberg specifically stated that his goal in releasing the software APIs was "to entice an even larger group of people to become entrepreneurs and build a compelling business on Facebook Platform." (4 AA 1098; 4 CAA 1220.) Therefore, it is clear that Facebook's statements meet both the second and third elements of the *Gore* test (the cause of action arises from representations about business operations or services, and the statement was made for the purpose of promoting or

securing sales of advertising or other commercial transactions). (*Gore, supra*, 49 Cal.4th at p. 30.)

c) Facebook's intended audience was potential and actual customers.

Under the fourth and final element of the *Gore* test, speech is exempt from anti-SLAPP protection if the intended audience is an actual or potential customer. (*Gore, supra*, 49 Cal.4th at p. 30.) Here, Facebook's statements about Facebook Platform were made to developers who were considering entering into contracts with Facebook to build their apps on Facebook Platform. (4 AA 1179; 4 CAA 1301 ["Facebook Platform is a development system that enables companies and developers to build applications for the Facebook website . . . ."].) Indeed, Facebook's assurances about access to the Graph API were directed toward those whom such data would be useful—businesses and software developers. While, in general, Facebook's audience also includes users of the Facebook website, Facebook made clear that this audience of "24 million active users" was a selling point to businesses seeking to build on Facebook Platform, noting that "[d]evelopers benefit from Facebook Platform as it gives them the potential to broadly distribute their applications . . . ." (*Ibid.*) Thus, just as in *Demetriades*, where the court found that Yelp's statements about the accuracy of its review filter were designed to attract businesses who would purchase advertising, Facebook's statements here were designed to attract developers who would build their apps on the Facebook Platform and purchase advertising to promote their businesses. In fact, Six4Three did just that. In reliance on Facebook's statements about the nature and

availability of the Graph API, Six4Three built its photo analysis technology on Facebook Platform and purchased advertising to promote its Pikinis application. (4 AA 1117-1118; 4 CAA 1239-1240.)

d) Facebook's user content is not the speech at issue.

In arguing that the speech at issue is protected, Facebook conflates the statements it made to developers with the user content it collected from the Facebook website. Facebook characterizes this lawsuit as attempting to control its "editorial decisions" over what user content it may publish or de-publish. (3 AA 930; 3 CAA 1053.) But Six4Three is not suing over user content. Indeed, the user content was simply a commodity that Facebook used to entice developers, so that they would build apps on Facebook Platform. The false and misleading representations Facebook made concern the non-discriminatory nature of the *access* it would provide to that commodity, namely that it would provide access to the Graph API, and that it would do so on an equal basis across developers, including Facebook itself. As in *Demetriades*, these are statements about Facebook's own operations, and they are distinct from the underlying user content—just as Yelp's statements about the accuracy of its review filter were commercial speech, distinct from the underlying content of the user reviews. (*Demetriades, supra*, 228 Cal.App.4th at p. 310.)

Facebook has not and cannot meet its burden on prong one of the anti-SLAPP analysis, because the speech at issue is unprotected, commercial speech under Code of Procedure section 425.17. On that basis alone, this Court should affirm the trial court.

D. Six4Three Demonstrates a Probability of Prevailing on the Merits.

Even if the Court finds that Six4Three's complaint covers some protected speech, the anti-SLAPP motion still fails because Six4Three can show a probability of prevailing on the merits.

1. The CDA Does Not Apply to Any Cause of Action.

Before the trial court, Facebook argued that its conduct is immunized by section 230 of the federal Communications Decency Act. (47 U.S.C. § 230, *et seq*.). But the CDA does not apply, as Six4Three seeks to hold Facebook liable for its own statements, not those of third parties.

In relevant part, section 230 of the CDA provides, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) As the language indicates, this provision acts to bar lawsuits that seek to hold companies like Facebook accountable for *user content*. As with its arguments on commercial speech, Facebook conflates the representations it made about access to user content with the user content itself. (3 AA 930; 3 CAA 1053.)

Each case Facebook cited to the trial court in support of its CDA argument concerns user content published or removed from the public website at issue. For example, *Sikhs for Justice*, upon which Facebook relies heavily, was a case about Facebook's decision to block access to the plaintiff's Facebook page for Facebook users in India. (*Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (2015) 144 F.Supp.3d 1088, 1089-1090.) Likewise, *Klayman v. Zuckerberg*

involved allegations that Facebook refused to remove a page that contained hate speech against Jews. (*Klayman v. Zuckerberg* (2014) 753 F.3d 1354, 1355.) And *Cross* was about "refusing to disable the unauthorized Facebook pages" that the plaintiff alleged were inciting violence and death threats against him. (*Cross*, *supra*, 14 Cal.App.5th at p. 200.) In each case, the plaintiffs sought to hold Facebook or its principals liable because they refused to remove content posted by third parties, or (in the case of *Sikhs for Justice*) because Facebook did remove content posted by the plaintiff user. And the publishing or de-publishing of the content at issue was to the Facebook website, *i.e.*, the forum that Facebook provides for users to post and view content. This is the type of "publishing" to which the CDA applies. (*See Fair Hous. Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1162-1163 [["A] website may be immune from liability for some of the content *it displays to the public* . . . ."] [emphasis added].)

In this case, the gravamen of Six4Three's complaint relates to misrepresentations Facebook made to Six4Three and other developers regarding fair and equal access to its APIs. This case is not about Facebook's decisions to publish or de-publish user content. Indeed, the decision to remove access to an API does not affect whether any content remains published. The data at issue is still published to users on the Facebook website and is available to select developers and businesses to whom Facebook provides preferential access. (4 CAA 1257; 4 AA 1135.) Some APIs, such as the User ID and Friends List APIs, are not even user-created; the data are entirely created by Facebook. But, contrary to Facebook's promises, none of this data is equally available to Six4Three or to similarly situated developers. In each cause of action in the Complaint, Six4Three seeks to hold

Facebook liable for agreeing to provide that data on an equal playing field to all developers, including Facebook itself, while knowingly and intentionally undermining that promise.

Moreover, Six4Three never had any desire to control Facebook's editorial decisions over content posted to users' Facebook pages, and it certainly understood that Facebook would remove offensive content from user pages in the ordinary course of business. In order to respect that process, Six4Three spent significant time and labor to develop built-in technology in its app that would remove such content whenever Facebook removed it from the website. Thus, anytime Facebook later de-published a piece of data, such as a photo, that it had previously sent to Six4Three through its APIs, Six4Three's technology would automatically de-publish that photo as well. (4 AA 1112; 4 CAA 1234.) Thus, to the extent Facebook suggests its decision to cut off developers' access to the Graph API was in the service of protecting user privacy, that is an *ad hoc* argument unsupported by the record. Given that developers like Six4Three operated within Facebook's existing privacy controls, the best way to increase user privacy would have been for Facebook to provide the data to developers with more stringent privacy controls in the first instance—something Facebook failed to do.

This is simply not the type of case to which the CDA is intended to apply. The CDA was enacted in order to provide "good Samaritan" protection to interactive computer services, to allow them to edit and remove user-generated content without becoming liable for the defamatory or otherwise unlawful content that they failed to edit or delete. (47 U.S.C. § 230, *et seq.*; *Roommates.com*, *supra*, 521 F.3d at p. 1163.) The three-part test for determining whether CDA immunity

applies must be interpreted consistent with this purpose. (*Roommates.com, supra*, 521 F.3d at p. 1164 ["[T]he substance of section 230(c) can and should be interpreted consistent with its caption," *i.e.*, "Protection for 'good samaritan' blocking and screening of offensive material."].) In that context, this case is closest to *Demetriades*, which held that the CDA simply did not apply where, as here, a plaintiff seeks to hold a defendant liable for its own statements regarding its operations, rather than the statements of third parties.

2. Six4Three's Claims are Meritorious.

Anti-SLAPP motions are intended to test cases at the pleading stage of litigation. Accordingly, the burden on the plaintiff to show a likelihood of prevailing on an anti-SLAPP motion is one of "minimal merit." (*Navellier, supra*, 29 Cal.4th at p. 89.) Here, Six4Three need only show a probability of prevailing on *any part* of each claim, in order to establish this minimal merit. (*Mann, supra*, 120 Cal.App.4th at p. 106 [emphasis added].) In evaluating the evidence presented, appellate courts "do not weigh credibility, nor [] evaluate the weight of the evidence." (*Grewal, supra*, 191 Cal.App.4th at p. 989.) Rather, courts "accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." (*Ibid.*) Under this standard, Six4Three's claims have sufficient merit to warrant denial of Facebook's motion.

a) Six4Three Can Prevail on its Breach of Contract Claim

Six4Three presented evidence to the trial court sufficient to demonstrate a likelihood of prevailing on its claim for breach of contract. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) First, it showed the existence of a contract by providing evidence that it had entered into Facebook's standard adhesion contract. (1 AA0254; 1 SRA 0245, 0433.) Second, it proffered testimony from Facebook confirming that Six4Three had never breached its obligations under the parties' agreement, but had instead fulfilled its duties. (1 SRA 0343; 1 SAA0182, 84-85, 90.) Third, it provided evidence showing that Facebook had not fulfilled its promise to provide "all rights to APIs, data and code" that it made available, and breached the parties' contract by violating its representations of open, equal and fair access to its APIs. (1 AA 0258; 1 SRA 0034; 0355-57, 0449, 0497-500.) Finally, Six4Three testified that it was harmed as a result of Facebook's breach of the parties' contract. (1 RA 0218.)

b) Six4Three Can Prevail on its Fraud and Tort Claims.

Six4Three presented sufficient evidence to the trial court to show a likelihood of prevailing on its causes of action for intentional and negligent misrepresentation. (*Lazar v. Sup. Ct.* (1996) 12 Cal.4th 631, 638.) This included evidence of misrepresentations made in the FAQ Facebook released to developers upon launching Facebook Platform, and other documents:

- "…applications from third-party developers are on a level playing field with applications built by Facebook." (4 AA 1092, 1179; 4 CAA 1214, 1301.)
- "…third-party developers can now create applications on the Facebook site with the same level of integration as applications built by internal Facebook developers." (*Ibid.*)
- "You can now build applications that have the same access to integration into the social graph as Facebook applications…" (4 AA 1088; 4 CAA 1210.)
- "Third-party applications won't be treated like second-class citizens." (4 AA 1089; 4 CAA 1211.)
- "Users are always in control of their information and can choose how much of their information is made available to specific applications." (4 AA 1180; 4 CAA 1302.)
- [redacted] (1 SRA 0505; 3 SCAA 1553.)[12]
- [redacted] (*Ibid.*)
- [redacted] (1 SRA 0508; 3 SCAA 1556.)

Six4Three also presented deposition testimony showing that [redacted] (1 SRA 0259-60, 0261-64; 3 SCAA 1307-1308, 1309-1312.) Facebook intended that Six4Three and other developers would rely on these statements and build applications on the Facebook Platform, [redacted] (1 SRA 0179-80; 3 SCAA 1169-1170.) Six4Three reasonably relied on these representations in deciding to build its photo analysis technology on the Facebook Platform. It certainly was not alone—it provided evidence that [redacted]

[12] Redacted text discloses material subject to the trial court's sealing orders of January 9, 2018 and November 1, 2018.

[redacted] (1 SRA 0248-49; 3 SCAA 1296-1297.) [redacted] (1 SRA 0209-0214; 3 SCAA 1199-1204.) [redacted] (*Ibid.*) [redacted]. (1 SRA 0230-31, 0530; 3 SCAA 1220-1221, 1854.) But not until January 20, 2015 did Facebook inform Six4Three that its technology would no longer function, once Facebook released the newest version of Facebook Platform and cut off access to the Graph API to non-whitelisted developers for good. (1 RA 0215, 0219; 5 CAA 1809, 1813.) As a result of Facebook's actions, Six4Three lost the more than $200,000 it had raised as seed capital, as well as the company's $4 million valuation, which it held at the time Facebook cut off Six4Three's access to the Graph API. (1 RA 0218, 0226; 5 CAA 1812, 1824.)

The same evidence underlies Six4Three's cause of action for concealment, demonstrating that Facebook concealed and suppressed material facts concerning its plan to shut down access to the Graph API for all but a limited number of "whitelisted" companies; that Six4Three did not know the concealed facts and would not have acted as it did if it had known those facts; and that Six4Three was harmed. (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248.) In addition, Facebook owed Six4Three a duty to disclose material facts, because the parties were in a business relationship by virtue of the SRR—the contract Six4Three was required to enter into

to access the Facebook Platform. (1 AA 0254; 1 SRA 0030, 0245, 0433; 4 SCAA 2687; 3 SCAA 1293, 1481.) Under the SRR, Six4Three was obligated to provide its confidential and proprietary information to Facebook, which triggered Facebook's duty to be fair and candid in its disclosures of material facts to Six4Three. (1 AA0254; 1 SRA 0030; 4 SCAA 2687; *Heliotis v. Schuman* (1986), 181 Cal.App.3d 646, 651 [holding that a duty to disclose arises when the defendant is in a fiduciary relationship with the plaintiff].) Facebook owed a duty for the additional reason that, having chosen to encourage developers like Six4Three to build on Facebook Platform, it had a duty to provide complete, material information to Six4Three. (*Rogers v. Warden* (1942) 20 Cal.2d 286, 289 [holding that one who elects to speak must make a "full and fair disclosure"]; *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294 [holding that a cause of action for concealment arises when: "(1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; or (3) the defendant actively conceals discovery from the plaintiff"].)

Six4Three's tortious-interference claims focus on an additional aspect of Facebook's fraud, that is, Facebook knowingly disrupted and/or terminated existing agreements and prospective economic relations between Six4Three and its customers. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) Six4Three submitted evidence to the trial court that it had existing purchase agreements with customers. Specifically, Six4Three's principal, Ted

Kramer, testified that as of April 30, 2015, 4,481 users had downloaded the Pikinis app, with 3,963 users subscribing to paid, premium content. (1 RA 0216; 5 CAA 1810.) Six4Three's projected profits from these user downloads and subscriptions was approximately $1.15 million. (*Ibid.*) Facebook knew of Six4Three's agreements with its customers because the SRR required developers to form and maintain such agreements [redacted] (1 SRA 0436-37; 3 SCAA 1484-1485.) [redacted] (1 SRA 0292-93; 1 SAA0682; 3 SCAA 1340-1341, 1492.) As a result of Facebook's actions, Six4Three could not fulfill its existing agreements or provide its app to potential customers. (1 RA 0215, 0219; 5 CAA 1809, 1813.) This harmed Six4Three. (1 RA 0218, 0226; 5 CAA 1812, 1824.)

c) Six4Three Can Prevail on its Section 17200 Claim.

Six4Three's claim under California Business and Professions Code section 17200, *et seq.*, is based on the allegations and evidence described above, and the role of those allegations and evidence in the overall scheme that Facebook developed to lure developers to build apps on Facebook Platform, falsely promising to provide access to more than 50 APIs on an equal playing field with other developers and

with Facebook itself. Far from maintaining an equal playing field, Facebook ousted the vast majority of competing apps, but "whitelisted" certain companies and apps for continued access, conditioning Facebook's provision of Graph API data on the purchase of costly advertising or other financial consideration. (1 SRA 0550; 4 SCAA 2235 [[redacted]], 1 SRA 0557; 4 SCAA 2264 [[redacted], 0570; 4 SCAA 2306 [[redacted]], 1 SRA 0577; 4 SCAA 2313 [[redacted]], 1 SRA 0537; 4 SCAA 2161 ([redacted]), 1 SRA 0542; 4 SCAA 2227 ([redacted]), 1 SRA 0532-540; 4 SCAA 2154-2161 ([redacted], 1 SRA 0582; 4 SCAA 2355 ([redacted]); 1 SRA 0630, 0511; 5 SCAA 4516; 3 SCAA 1778 [redacted]).

The facts and evidence of this scheme support Six4Three's likelihood of prevailing on all three prongs of its section 17200 claim. First, under the "unfair" prong, the evidence proffered to the trial court supports Six4Three's allegation that Facebook sought to and did significantly threaten or harm competition. (Cal. Bus. & Prof. Code § 17200; *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 187.) Six4Three produced evidence showing that [redacted]. (1 SRA 0292-93; 1 SAA0682; 3 SCAA 1340-1341, 1492.) Six4Three also produced evidence showing that Facebook had entered into tying arrangements with certain companies, sufficient to support a claim under the Cartwright Act. (1 SRA 0590-628; 4 SCAA 2623-2661 [[redacted]];

Cal. Bus. & Prof. Code § 16727; *UAS Mgmt. Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 368–369.)

Second, under the "unlawful" prong, the evidence described above and provided by Six4Three to the trial court supports a number of predicate violations, including Facebook's violations of California's misrepresentation and concealment statutes (Cal. Civ. Code § 1719, *et seq*.), Six4Three's common law tort and fraud claims, and Facebook's violation of a July 27, 2012 Federal Trade Commission order, which serves as an independent predicate violation, cognizable under section 17200. (Cal. Bus. & Prof. Code § 17200; *Cel-Tech, supra,* at p. 180 [section 17200 "borrows violations of other laws and treats them as unlawful practices."]; 5 CAA 2296.)

Third, the evidence Six4Three has produced to support its fraud and tort causes of action also supports a claim under the "fraudulent" prong of section 17200. (Cal. Bus. & Prof. Code § 17200.) Six4Three's burden here is low, as Six4Three need only show that the public is likely to be deceived by Facebook's actions. (*In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 312.) Six4Three provided evidence showing [redacted]. (1 SRA 0248-49; 3 SCAA 1296-1297.) Six4Three seeks the injunctive relief available under Section 17200, as Facebook continues to represent to this day that [redacted] (2 SAA 0993; 3 SCAA 1483.)

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order denying Facebook's anti-SLAPP motion.

CERTIFICATION OF WORD COUNT

In compliance with California Rules of Court, Rule 8.204(c)(1), I hereby certify that Cross-Appellant Six4Three's Opening Brief contains 13,144 words, including footnotes, as calculated by the word processing software used to prepare the brief.

Dated: March 27, 2019

/s/ Scotia J. Hicks

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